

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	
	:	CRIMINAL ACTION
	:	
v.	:	
	:	
ALLEN S. STRATTON	:	NO. 99-326
a/k/a "Neck Bone"	:	

MEMORANDUM AND ORDER

YOHN, J. July , 2000

On June 15, 1999, the government filed a ten-count indictment against the defendant Allen S. Stratton.¹ In the indictment, the defendant was charged with the following offenses: Counts I, III, and V, for distribution of crack cocaine; Counts II, IV, VI, and VIII, for possession and distribution of crack cocaine within 1,000 feet of a school; Count VII for possession of five grams or more of crack cocaine with intent to distribute; Count IX for possession of a firearm in furtherance of a drug trafficking crime; and Count X for possession of a firearm by a previously convicted felon.² See Indictment (Doc. No. 10). On November 9, 1999, a jury trial began in this case. On November 15, 1999, the jury returned with its verdict finding the defendant guilty of Counts I through VIII (i.e., three counts of distribution of a controlled substance, three counts of distribution of a controlled substance within 1,000 feet of a school, one count of possession of a controlled substance with intent to deliver, and one count of possession of a controlled substance

¹All of the documents in this case, including the defendant's own post-trial motions, refer to the defendant in the caption as "Allen S. Stratton." In his direct examination at trial, however, the defendant testified that his full name was "Allen Alonzo Stratton." See Nov. 12, 1999, Trial Tr. at 118.

²The indictment also contained a notice of forfeiture pursuant to 21 U.S.C. § 853.

with intent to deliver within 1,000 feet of a school). The jury found the defendant not guilty of Counts IX and X (the firearm charges).

The defendant has filed post-trial motions for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), or in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33. For the reasons that follow, the court will deny the defendant's motions.

FACTUAL BACKGROUND

The evidence presented at trial can be summarized as follows. In the months preceding December 14, 1998, David Carolina, an officer with the Philadelphia Police Department, observed the defendant's activities on the 1300 block of Webster street in South Philadelphia. See Nov. 10, 1999, Trial Tr. at 38-39. Carolina testified that on over ten occasions he saw the defendant give someone a small item from his hand in exchange for money. See id. at 39-40. Carolina also testified that he saw the defendant enter and exit the residences at 1311 and 1313 Webster street.³ See id. at 39. On December 7, 1998, Carolina called the South Narcotics Division of the Philadelphia Police Department and reported his observations of the defendant to Police Officer Willie Jones. See id. at 40.

Terrence Flomo and Willie Jones, police officers with the Narcotics Division, then began an undercover investigation of the defendant's activities on the 1300 block of Webster street. See Nov. 10, 1999, Trial Tr. at 50-51. On the afternoon of December 14, 1999, Flomo and Willie Jones were observing the corner of 13th and Webster streets. See id. at 51. Flomo approached the defendant and asked to buy drugs. See id. at 51-52. The defendant led Flomo

³Several people, including the defendant, testified that the house at 1313 Webster street had been owned by the defendant's deceased grandmother and was still used by family members, including the defendant. See Nov. 12, 1999, Trial Tr. at 93, 126-27.

into the house located at 1311 Webster street, where he gave Flumo “two black tinted Ziploc plastic packets, each containing an off-white chunk of substance” See id. at 52-54. In exchange, Flumo gave the defendant \$10 in “prerecorded buy money.” See id. Later that same afternoon, Willie Jones also purchased four packets of what appeared to be crack cocaine from the defendant in exchange for \$20. See id. at 56, 79-81. During this purchase, the defendant was located a few feet from the northeast corner of Webster street. See id. at 56, 79-80.⁴

Flomo further testified that on the afternoon of December 15, 1998, he purchased 2 more packets of crack from the defendant on the northwest corner of 13th and Webster streets. See id. at 63-68. In exchange, Flomo gave the defendant \$10 in prerecorded United States currency. See id. at 68. Willie Jones testified that he observed this exchange. See id. at 83.

The police then obtained a search warrant for 1313 Webster street. See id. at 96. As the execution of the search warrant began, the defendant fled from the house on his bicycle. See id. at 154-55. Police Officers Ronald Jones and Ronald McCutcheon chased the defendant on foot and eventually apprehended and arrested him. See id. at 105, 155-56. At the time of his arrest, the police seized from the defendant’s person a set of keys and \$10 in United States currency which was one of the prerecorded bills given to the defendant by Flomo. See id. at 105, 156. The police later learned that one of the keys seized from the defendant unlocked the door to the house at 1313 Webster street. See id. at 156. Also, Police Officer James Gilrain and Police Officer Mark Uffelmann, who also chased the defendant as he fled, testified that they saw the

⁴Ellen Savitz, the principal at the Philadelphia High School for the Creative and Performing Arts, testified that the school is located on Broad street between Christian and Carpenter streets. See Nov. 10, 1999, Trial Tr. at 152-53. Police Officer Bernard Avery later testified that the distance between 1313 Webster street and the Philadelphia High School for the Creative and Performing Arts is less than 1,000 feet. See Nov. 15, 1999, Trial Tr. at 5-8.

defendant throw a packet of marijuana and money on the street while he was fleeing from the police on his bicycle. See id. at 170, 175-77.

When the police officers executed the search warrant at 1313 Webster, they found the following in the second floor bedroom at the front of the house: (1) a plate with approximately 6 grams of crack cocaine on it and a razor; (2) small, empty plastic packets resembling the packets used by the defendant to sell crack to Officers Willie Jones and Flomo; (3) small bags of marijuana in the pocket of a man's coat in the room; (4) \$400 in cash in the same coat pocket as the marijuana; (5) photo identification cards and other documents bearing the defendant's name; and (6) a .38 caliber Smith & Wesson revolver. See Nov. 10, 1999, Trial Tr. at 108-11, 119-33, 157; Nov. 12, 1999, Trial Tr. at 74-75. During the search, the police also recovered several photographs of the defendant with what appeared to be firearms. See Nov. 15, 1999, Trial Tr. at 9-10. Originally, I excluded these photographs on the ground that they were unduly prejudicial. I reversed this decision, however, when the defendant testified on cross-examination that he had never possessed a gun and had never dealt with guns before. See Nov. 12, 1999, Trial Tr. at 143-44. Because the defendant opened the door into this line of questioning, I determined that the pictures were relevant and a proper topic for cross-examination of the witness. See id. at 149-50.

The government also introduced at trial the testimony of Zacharian Cherian, a chemist employed by the Philadelphia Police Department chemistry lab. See Nov. 10, 1999, Trial Tr. at 178. Cherian testified that he personally tested the substance purchased from the defendant by Officer Flomo and Officer Jones on December 14, 1998, and December 15, 1998, and he determined that the substance was crack cocaine. See id. at 182-85. Cherian also testified that the razor blade found in the second floor bedroom at 1313 Webster street contained a residue of

crack cocaine. See id. at 186. Finally, Police Officer Lewis Palmer, who is assigned to the Narcotics Field Unit in West Philadelphia, testified that in his opinion the evidence presented in this case demonstrated that the defendant possessed the crack cocaine with an intent to deliver. See Nov. 12, 1999, Trial Tr. at 57. Palmer also testified that it was his opinion that the defendant was a narcotics dealer. See id.

STANDARD OF REVIEW

Federal Rule of Criminal Procedure 29(c) provides that a defendant may, within 7 days after the verdict, or such longer time as the court may prescribe, file a motion for judgment of acquittal. See Fed. R. Crim. P. 29(c). “A defendant challenging the sufficiency of the evidence bears a heavy burden.” United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992). In reviewing the record to determine whether there was sufficient evidence to support a conviction, “the court must view the evidence and the inferences logically deducible therefrom in the light most favorable to the government, to determine if there is sufficient evidence to support the factfinder's verdict.” See United States v. McNeill, 887 F.2d 448, 450 (3d Cir. 1989), cert. denied, 493 U.S. 1087 (1990). “The evidence need not unequivocally point to the defendant's guilt as long as it permits the jury to find the defendant guilty beyond a reasonable doubt.” United States v. Pungitore, 910 F.2d 1084, 1129 (3d Cir. 1990), cert. denied sub nom Virgilio v. United States, 500 U.S. 915 (1991). “A verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt.” United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987) (citations omitted); see also United States v. Salmon, 944 F.2d 1106, 1113 (3d Cir. 1991) (finding that in evaluating the sufficiency of the evidence to support a conviction, the court “must determine

whether a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all of the elements of the offenses”), cert. denied sub nom Washington v. United States, 502 U.S. 1110 (1992).

In the alternative to a judgment of acquittal, the defendant requests that the court grant a new trial pursuant to Federal Rule of Criminal Procedure 33. Pursuant to Rule 33, “[o]n a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require.” See Fed. R. Crim. P. 33; see also United States v. Bevans, 728 F. Supp. 340, 343 (E.D. Pa.) (“[The court] may set aside the verdict and order a new trial if it is ascertained that the verdict constitutes a miscarriage of justice.”), aff'd, 914 F.2d 244 (3d Cir.1990). “The decision whether to grant a motion for a new trial under Rule 33 is committed to the sound discretion of the trial court, which may set aside the verdict and order a new trial if it ascertains that the verdict constitutes a miscarriage of justice.” United States v. Daniels, 95-CR-369, 1996 WL 311444, at *4 (E.D. Pa. June 6, 1996) (citing United States v. Martorano, 596 F. Supp. 621, 624 (E.D. Pa. 1984), aff'd, 767 F.2d 63 (3d Cir.), cert. denied, 474 U.S. 949 (1985)).

DISCUSSION

The defendant argues that the court should grant his motion for a judgment of acquittal, or in the alternative, his motion for a new trial, for the following six reasons: (1) the evidence was insufficient to support any of the convictions; (2) the evidence was insufficient to support a conviction for possession with intent to deliver because there was inadequate evidence that the controlled substance was under the dominion and control of the defendant and therefore, the defendant did not constructively possess the controlled substance; (3) the verdict was inconsistent and thus, unreasonable; (4) the court erred in holding that there was probable cause

for the search and seizure at 1313 Webster street; (5) the court erred in admitting into evidence the undated photographs of the defendant with firearms; and (6) the court erred in refusing to order a mistrial when a police officer took the witness stand and showed the jury two guns as evidence when the defendant had only been charged with possession of one gun. See Memorandum of Law in Support of Defendant's Post-Trial Motions ("Def.'s Memo.") at 3-4. I do not find the defendant's arguments persuasive, however, and for the reasons that follow I will deny the defendant's motion for judgment of acquittal, or in the alternative, motion for a new trial.

1. Sufficiency of the Evidence⁵

The defendant first argues that "it was against the weight of the evidence for the jury to have convicted the defendant on these facts." See Def.'s Memo. at 4. To support the jury verdict in this case, the government had to prove beyond a reasonable doubt the elements of distribution of crack cocaine, possession of crack cocaine with intent to distribute, distribution of crack cocaine within 1,000 feet of a school, and possession of crack cocaine with intent to distribute within 1,000 feet of a school.

a. Distribution of Crack Cocaine

To prevail on the distribution charge the jury had to have found beyond a reasonable doubt that the defendant engaged in: "(1) knowing or intentional; (2) distribution; (3) of a

⁵In his post-trial motion, the defendant argues, among other things, that: (1) the verdict was against the weight of evidence in general; and (2) the verdict was against the weight of evidence for the possession charge because there was insufficient evidence from which the jury could conclude that the crack cocaine was within the dominion and control of the defendant. See Def.'s Memo. at 3. Because both of these arguments address the same issue (i.e., whether there was sufficient evidence to support the jury's verdict), I will address them together in this section.

controlled substance.”” See United States v. Johnson, 130 F.3d 1420, 1429 (10th Cir. 1997), cert. denied, 525 U.S. 829 (1998) (quoting United States v. Santistevan, 39 F.3d 250, 255 (10th Cir. 1994)); 21 U.S.C. § 841(a)(1); see also United States v. Gore, 154 F.3d 34, 45 (2d Cir. 1998) (listing elements of a distribution charge).

Examining the evidence presented at trial, I conclude that a reasonable jury easily could have found that the defendant knowingly and intentionally distributed crack cocaine. Police Officer Carolina testified that he observed the defendant give someone a small item from his hand in exchange for money on at least 10 occasions. Officer Flomo then testified that, in conjunction with an undercover investigation, he purchased \$10 worth of crack cocaine from the defendant on December 14, 1998 (counts one and two of the indictment). Police Officer Willie Jones testified that he also purchased four packets of crack cocaine from the defendant in exchange for \$20 later in the afternoon on December 14, 1998 (counts three and four of the indictment). Flomo also testified that on the afternoon of December 15, 1998, he purchased 2 additional packets of crack cocaine from the defendant in exchange for \$10 (counts five and six of the indictment). Flomo’s partner, Willie Jones, testified that he observed this exchange. Finally, the government presented testimony from a chemist employed by the Philadelphia Police Department chemistry lab, who stated that he personally tested the substance purchased by Flomo and Jones from the defendant, and he determined that the substance was crack cocaine. Based on this evidence, there is no question that a reasonable jury could have found that the defendant knowingly and intentionally distributed a controlled substance, namely crack cocaine, to Officers Flomo and Jones on December 14, 1998, and December 15, 1998. Accordingly, I

will deny the defendant's post-trial motion for judgment of acquittal as to the distribution charges.

b. Possession of Crack Cocaine with Intent to Distribute

"[T]he essential elements of the crime of possession are that the defendant: (1) knowingly (2) possessed a controlled substance (3) with a specific intent to distribute it." Gore, 154 F.3d at 45; 21 U.S.C. § 841(a)(1). The defendant contends that he could not be convicted of possession with intent to deliver crack cocaine under a theory of "constructive possession" because the evidence did not demonstrate that he had dominion and control over the crack cocaine. See Def.'s Memo. at 4-5. In other words, the defendant argues that because others had "equal, if not more affirmative, access" to the crack cocaine, the evidence was insufficient to support a possession conviction. See id. at 5.

The theory of constructive possession applies when "[a] person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons" United States v. Garth, 188 F.3d 99, 112 (3d Cir. 1999) (citations omitted). "Thus, constructive possession requires an individual to have the power and intent to exercise both dominion and control over the object he or she is charged with possessing." See id. (citations omitted). The fact that others may have had access to the object does not negate a finding of constructive possession so long as the government can show that the defendant had "both the power and intent to exercise dominion and control." See id. at 113.

In this case, there was sufficient evidence to support a jury finding that the defendant had the power and intent to exercise dominion and control over the crack cocaine found in the

second-floor bedroom during the search and seizure at 1313 Webster street. The government presented the following evidence linking the defendant to the house: (1) the house had belonged to the defendant's deceased grandmother and was still used by family members; (2) the defendant had a key that unlocked the front door to the house on his person at the time of his arrest; (3) the defendant was observed by police officers leaving and returning to the residence over an extended period of time prior to his arrest; (4) defendant's own witnesses, including his sister, confirmed that the defendant had access to, and was regularly present at, the residence.

Furthermore, the defendant was linked to the second-floor bedroom, where the crack cocaine was discovered, by the following personal items that were found by the police in the room: (1) a Pennsylvania identification card in the name of Allen Stratton with the address of 1313 Webster Street; (2) a Pennsylvania access card in the name of Allen Stratton; (3) a voter registration card in the name of Allen Stratton with the address of 1313 Webster Street; (4) a K-Mart Distribution Center identification card with a picture of Allen Stratton; (5) a St. Ignatius Nursing Home identification card with a picture of Allen Stratton; (6) an organizer page from phone book with the name of Allen Stratton and the address of 1313 Webster Street; (7) a Bell Atlantic phone bill in the name of Allen Stratton with the address of 1313 Webster Street; (8) a Philadelphia Traffic Court Notice dated December 7, 1998, to Allen Stratton with the address of 1313 Webster Street; (9) a bill from Solomon & Solomon, Attorney at Law, dated August 31, 1998, to Allen Stratton; and (10) a black book containing Allen Stratton's name. Finally, the empty plastic packets discovered in the second-floor bedroom were identical to the packets used to package the crack cocaine sold by the defendant to the undercover police officers. Thus, viewing the evidence and the inferences logically deducible therefrom in the light most favorable to the government, there

is sufficient evidence to support the jury's finding that the defendant had constructive possession of the crack cocaine discovered in the second-floor bedroom of the residence at 1313 Webster street. Accordingly, I will deny the defendant's motion for judgment of acquittal on the charge of possession of crack cocaine with intent to distribute.

c. Distribution and Possession Within 1,000 Feet of a School

To prove that the defendant violated 21 U.S.C. § 860(a), the government needed to prove beyond a reasonable doubt that the defendant violated 21 U.S.C. § 841(a)(1) (i.e., the possession or distribution of a controlled substance) within 1,000 feet of a protected place, such as a school. See 21 U.S.C. § 860(a); United States v. McQuilkin, 78 F.3d 105, 108-09 (3d Cir. 1996) (explaining that § 860 is a separate offense and requires proof of a "separate and distinct element—distribution within 1,000 feet of a school"). Here, the government presented ample evidence concerning the location of the Philadelphia High School for the Creative and Performing Arts. There was also evidence presented that the distance between 1313 Webster street and the Philadelphia High School for the Creative and Performing Arts is less than 1,000 feet. Therefore, once the jury concluded that a violation of 21 U.S.C. § 841(a)(1) had occurred at 1313 Webster street, there was sufficient evidence from which a reasonable jury could conclude that the narcotics violation occurred within 1,000 feet of a school building, which is a protected place pursuant to 21 U.S.C. § 860(a). Accordingly, I conclude that the evidence was sufficient to support the jury verdict on these counts and I will deny the defendant's motion for judgment of acquittal on these counts.

2. Inconsistent Verdict

The defendant next argues that the “verdict was patently unreasonable” because the jury acquitted the defendant of the firearm charges, but convicted the defendant of the drug charges. See Def.’s Memo. at 5-6. As the government points out in its response, the verdict was not inconsistent because different evidence was presented relating to the drug charges than the gun charges. See United States’ Response to Defendant’s Post Trial Motions (“Govt.’s Resp.”) at 10-11. The only evidence linking the defendant to the gun was its presence in the second-floor bedroom of the residence on 1313 Webster street. The evidence as to the narcotics charges included, among other things, testimony from two police officers that they bought crack cocaine from the defendant. There was also testimony that the defendant was observed entering and exiting the residence and engaging in what appeared to be narcotics transactions. Finally, there was testimony that the type of package found in the second-floor bedroom was the same type of package that the defendant used to contain the crack cocaine that he sold to Officers Flomo and Jones. Thus, because of the additional evidence that was present with regard to the narcotics charges it is entirely reasonable, and not at all inconsistent, for the jury to have convicted the defendant on the charges of possession and distribution of crack cocaine while also acquitting him on the firearm counts. Furthermore, assuming for the sake of argument that the verdicts were inconsistent, this would not be a basis for setting aside the jury’s verdict. See United States v. Powell, 469 U.S. 57, 66 (1984). Consequently, I will not grant the defendant’s motion for judgment of acquittal on this ground.

3. Probable Cause for the Search Warrant

On August 4, 1999, the defendant filed his original motion to suppress physical evidence. See Def.’s Motion to Suppress Physical Evidence (Doc. No. 17). The government filed its

response to this motion two days later. See United States’ Memo. in Response to Defendant’s Motion to Suppress (Doc. No. 20). After considering the submissions of the parties, and hearing argument on the issue, I denied the defendant’s motion on November 10, 1999. See Court Order of November 10, 1999 (Doc. No. 33). In his motion for judgment of acquittal and motion for a new trial, the defendant argues that the court erred as a matter of law in denying his motion to suppress. In his motion, the defendant incorporates the arguments set forth in his original motion to suppress. See Def.’s Memo. at 6. I have again considered those arguments and I again find that there was probable cause to support the search warrant. Therefore, I will deny the defendant’s motion.

This court reviews the magistrate judge’s initial probable cause determination with great deference. See United States v. Conley, 4 F.3d 1200, 1205 (3d Cir. 1993) (describing the standard used for reviewing a magistrate judge’s probable cause determination) (citing Illinois v. Gates, 462 U.S. 213, 236 (1983)). My role as the reviewing court, therefore, is quite limited and I must “uphold the warrant as long as there is a substantial basis for a fair probability that evidence will be found.” See United States v. Williams, 124 F.3d 411, 420 (3d Cir. 1997); see also Conley, 4 F.3d at 1205 (explaining that the “duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed”).

“Probable cause is determined by a ‘totality-of-the-circumstances analysis,’ under which a magistrate judge must ‘make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.’” See Williams, 124 F.3d at 420 (quoting Gates, 462 U.S. at 238). Moreover, the magistrate judge must read the supporting

affidavit “in its entirety and in a common sense and nontechnical manner” in determining whether there is probable cause to believe that contraband or evidence is located in a particular location. See Williams, 124 F.3d at 420.

Reading in its entirety the affidavit supporting the search warrant in this case, there is no question that there was more than enough information supplied in the affidavit that would have permitted the magistrate judge to find probable cause for the search warrant. The affiant, Police Officer Ronald Jones, had 12 years of experience on the police force, with 7 years of that time spent specifically in a narcotics field unit. See Affidavit of Ronald Jones (Ex. to United States’ Memo. In Response to Defendant’s Motion to Suppress) (Doc. No. 20). In his affidavit, Officer Ronald Jones swore that he believed illegal narcotics were being distributed from inside of 1311 and 1313 Webster street. See id. Officer Jones also stated the following factual basis for this determination in his affidavit: On December 7, 1998, officers in the South Narcotics field unit were informed that illegal narcotics were being sold and stored at 1311 and 1313 Webster street. See id. Police then learned, through voter registration and real estate documents, that Annabelle Stratton and Allen Stratton were the registered owners of the house at 1313 Webster street. See id. At that time, police also learned that Allen Stratton had previously been arrested for a narcotics violation. See id. On December 14, 1998, Officer Flomo purchased drugs from a black male inside 1311 Webster street. See id. Later that day, Officer Flomo bought additional drugs from the same black male. See id. On December 15, 1998, the affiant, Officer Ronald Jones, and another officer observed the defendant engaging in what they believed to be the sale of illegal narcotics. See id. The police officers also observed the defendant using a key to enter the house at 1313 Webster street. See id. Considering the totality of the evidence presented to the

magistrate judge in the form of this affidavit, I have no trouble concluding that the magistrate judge had a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime would be found in 1313 Webster street.⁶

4. Admission into Evidence of Government Exhibits 8, 9, and 10

At trial, the government sought to introduce into evidence three photographs depicting the defendant, in various poses, with firearms. The defendant filed a motion in limine to exclude these photographs (labeled government exhibits 8, 9, and 10). The government responded to the motion, and I heard argument on the issue at the time of trial. Following the argument, I concluded that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice and therefore, I excluded the photographs from evidence.

At trial, the defendant took the stand and testified in his own defense. During his cross-examination, the following colloquy took place between counsel for the government and the defendant:

- Q: You don't know how that got there; right?
A: No, sir.
Q: Okay. And, [the gun seized by police during the search of 1313 Webster street on December 15, 1998], you're saying you don't have any idea how that gun got [into the second-floor bedroom at 1313 Webster street] . . . ?
A: Because I don't deal with guns.
Q: You don't deal with guns?
A: No, sir.
Q: Never deal with guns?

⁶Even if I had a doubt, which I do not, that there was probable cause set forth in the affidavit supporting this search warrant, I find that this case would qualify under the good faith exception enunciated by the Supreme Court in United States v. Leon, 468 U.S. 897, 920-21, 926 (1984). The search would still be valid because the officers acted in reasonable reliance based on a search warrant issued by a detached and neutral magistrate, even if that warrant was ultimately found to be unsupported by probable cause. For this additional reason, therefore, I will deny the defendant's motion for a new trial on this ground.

A: No. A lot of my friends got killed with guns.
Q: Okay. So, you've never had a gun?
A: No.
Q: Never?
A: Nope.
Q: You've never had guns on you?
A: No, sir.
[Defense Counsel]: Objection, Your Honor.
The Court: Overruled.

Nov. 12, 1999, Trial Tr. at 143-44. Following this exchange, the government renewed its request for admission of the photographs into evidence. See id. at 149-50. The government argued that the defendant had “gone out of his way to say that he’s never had guns” and because he had overstepped the bounds of the question in his response, the photographs were now admissible. See id. at 149-50. I agreed with the government that the questioning was limited to the issue of the gun that was found during the search of the premises on December 15, 1998. See id. at 150. I concluded that it was the defendant who had opened the door into a line of questioning about whether he had ever owned, or had in his possession, any guns. See id. Thus, I permitted the government to introduce into evidence government exhibits 8, 9, and 10. See id.

In his present motion, the defendant argues that the admission of these photographs at trial was error and he is now entitled to a new trial. See Def.’s Memo. at 6-7. The defendant argues that: (1) the government taunted the defendant into denying any involvement with guns at any point in his life; and (2) the government did not need the photographs to cross-examine effectively the defendant.⁷ See id. at 6. I do not find either of these arguments persuasive. As I

⁷In his motion for a new trial, the defendant also incorporates the arguments set forth in his motion in limine seeking to exclude the photographs. See Def.’s Memo. at 6. As noted above, the court initially granted this motion and therefore, accepts the arguments set forth in that motion. The decision to admit the photographs, however, was not made because the court altered its initial decision, but rather because the defendant denied ever having any contact with guns.

stated on the record at trial, I do not believe that the government beguiled the defendant into testifying about guns other than the gun at issue in the trial. The government asked a question focused specifically on ascertaining the defendant's knowledge about the firearm at issue in this case. At his own peril, the defendant gave a broad, sweeping answer that encompassed his possession of any guns, whether or not those guns were at issue in the case. Therefore, as I stated at trial, it was the defendant, not the government, who opened the door to this line of inquiry. Furthermore, I reject the defendant's argument that this evidence was not necessary for an effective cross-examination of the defendant. Quite to the contrary, this evidence reflects on the credibility of the defendant and is, therefore, highly relevant and probative. Thus, I will deny the defendant's motion for a new trial on the ground that government exhibits 8, 9, and 10 were improperly admitted into evidence during trial.

5. Inclusion of Second Gun with Exhibit 29

As explained above, the defendant was charged with possession of one firearm, a .38 caliber Smith & Wesson revolver that was allegedly seized by the police in the second-floor bedroom of the residence at 1313 Webster street. The .38 caliber Smith & Wesson was marked as government exhibit 29 and presented to Police Officer Ronald Jones for identification at trial. See Nov. 10, 1999, Trial Tr. at 125. When government exhibit 29 was handed to Officer Jones, however, it was inadvertently presented as a package containing two guns⁸ tied together with a

The defendant's statements, therefore, opened the door to the admission of this evidence.

⁸Apparently the second gun was also found during the police search of 1313 Webster street on December 15, 1998. See Nov. 12, 1999, Trial Tr. at 126. The second gun, however, was not found in the second-floor bedroom of the house and the government did not charge the defendant with possession of this gun. See id. Therefore, this gun was not at issue in this case.

large envelope and evidence tag. See id. at 127. As explained above, only one of the guns, the .38 caliber Smith and Wesson, was relevant to the case. Defense counsel objected to the presentation of the second gun to the jury and requested a mistrial. See id. at 126. After consultation with counsel outside of the presence of the jury, I determined that a mistrial was not warranted for the following reasons: (1) the envelope and evidence tag covered the majority of the second gun and so, it would have been difficult for the jury to have observed any significant part of that gun; (2) defense counsel objected promptly and the government immediately cured the problem by removing the second gun; and (3) no testimony was presented concerning the second gun. See id. at 127-28. Therefore, I found that there would be no prejudice to the defendant because I found that it was unlikely that the jury would have been able to notice the second gun and because no testimony was offered as to the significance of the second gun. For those same reasons, I conclude that a new trial is not warranted on this ground because there was no miscarriage of justice in this case.⁹ Moreover, the lack of prejudice to the defendant from the jury seeing the second gun, if it did, is patent from the fact that the jury acquitted the defendant of all charges arising out of his alleged possession of the other gun.

CONCLUSION

Because I find that the evidence presented by the government at trial was sufficient to support the defendant's conviction on counts I through VIII of the indictment, and because I find that the jury's verdict was not inconsistent, I will deny the defendant's motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Furthermore, because I find that

⁹Defense counsel declined the court's offer to instruct the jury to disregard the second gun. See Nov. 10, 1999, Trial Tr. at 130.

there was no miscarriage of justice in this case that would warrant the granting of a new trial, I will deny the defendant's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	
	:	CRIMINAL ACTION
	:	
v.	:	
	:	
ALLEN S. STRATTON	:	NO. 99-326
a/k/a "Neck Bone"	:	

ORDER

AND NOW, this day of July, 2000, upon consideration of defendant's post trial motions (Doc. No. 47), defendant's memorandum of law in support of defendant's post trial motions (Doc. No. 46), and the government's response thereto, IT IS HEREBY ORDERED that defendant's post trial motions are DENIED.

It is FURTHER ORDERED that sentencing is scheduled for July 28, 2000 at 3 p.m.

William H. Yohn, Jr., J.